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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 633

DR. ANTHONY J. CINCOTTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the United States District Court (R. 20-26) is reported at 115 F. Supp. 643. The opinion of the Court of Appeals (R. 39-43) is reported at 209 F. 2d 122.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1953. (R. 43.) The petition for a writ of certiorari was filed on March 13, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the order of the District Court directing a hospital to furnish, for a revenue agent's inquiry under authority of Section 3614(a) of the Internal Revenue Code, the names and addresses of petitioner's patients who had been confined in that hospital during the years 1946 to 1950, inclusive.

STATUTES INVOLVED

Internal Revenue Code:

> SEC. 3614. EXAMINATION OF BOOKS AND WITNESSES.
>
> (a) *To Determine Liability of the Taxpayer.* —The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.
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> * * * * *
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> (26 U.S.C. 1946 ed., Sec. 3614.)

SEC. 3633. JURISDICTION OF DISTRICT COURTS.

(a) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3633.)

New York Civil Practice Act:

SEC. 352. *Physicians, dentists and nurses not to disclose professional information.*

A person duly authorized to practice physic or surgery, or dentistry, or a registered professional or licensed practical nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity; unless, in cases where the disclosure of the information so acquired by a dentist is necessary for identification purposes, in which case the dentist may be required to testify solely with respect thereto, or unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician, dentist or nurse may be required to testify fully in relation thereto upon any examination, trial or other proceeding in

which the commission of such crime is a subject of inquiry.

SEC. 354. *Application of sections relating to confidential communications.*

The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * *

STATEMENT

On November 5, 1952, the Commissioner of Internal Revenue, acting under authority of Section 3614 of the Internal Revenue Code, issued a summons (R. 4-5) to the Albert Lindley Lee Memorial Hospital requiring it to appear before a special agent of the Internal Revenue Service and give testimony concerning the tax liability of Dr. Anthony J. Cincotta, petitioner herein, and further directing it to produce all books, papers, records, and memoranda relating to the names and addresses of petitioner's patients admitted to that institution during the years 1946 through 1950.

The hospital refused to comply with the summons, and on January 23, 1953, the United States District Court for the Northern District of New York entered an order directing the hospital to allow a special agent of the Intelligence Division of the office of the Director of Internal Revenue for the 21st District of New York to inspect its books in order to obtain the names and addresses of petitioner's patients confined in the hospital during the period 1946 through 1950. (R. 6-7.)

On February 4, 1953, an order (R. 8-10) was granted upon motion of petitioner requiring the Director to show cause why the order requiring the hospital to permit the inspection of its books and records should not be vacated upon the ground that compliance therewith "would constitute divulging privileged and confidential communications" by the hospital. On the same date, an order (R. 15-16) was entered granting petitioner leave to intervene in the proceeding.

A similar order (R. 29-31) to show cause was procured by the hospital.

After hearing upon the motions to vacate the order, the District Court filed a memorandum decision denying the motions. The Court held that disclosure of the names and addresses of petitioner's patients, which was all its order required, involved no violation of the doctor-patient privilege under the New York statutes. (R. 20-26.) The Court of Appeals affirmed the order of the District Court. (R. 43.) [1]

ARGUMENT

The order of the District Court directed the hospital to disclose only the names and addresses of petitioner's patients who had been confined in the hospital. (R. 42.) The Court of Appeals agreed with the holding of the District Court that this information was not privileged under the New York statutes petitioner invokes. (R. 20-26, 40-41.) That holding is clearly in accord with the state

[1] The hospital apparently abandoned its appeal since it filed no brief. (R. 40.)

statutes and with the state decisions construing them.[2] It is in itself sufficient to dispose of petitioner's contentions and to demonstrate the absence of occasion for further review by this Court.

The Court of Appeals held, in any event (R. 41-42), that determination of what evidence is admissible in an income tax investigation under Section 3614(a) of the Internal Revenue Code (*supra*, p. 2) was a matter to be decided according to federal, rather than state, law. This conclusion accords with the decision in *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U. S. 864, and is, we think, clearly correct. Thus, even if the New York law had the effect of keeping secret the names of petitioner's patients, such an impediment could not operate to disable at its outset the investigation of petitioner's income for purposes of the federal revenue. This conclusion by no means entails holding testimonial privileges unavailable in such investigations; on the contrary, the Court of Appeals assumed *arguendo* (R. 42) that these investigations are subject to the same privileges as judicial proceedings.[3] As the Court pointed out, however (R. 42), the revenue agent in this case was not seeking privileged information as to the nature of any pa-

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[2] See *Falkenhainer* v. *Falkenhainer*, 198 Misc. 29; *Klein* v. *Prudential Ins. Co.*, 221 N. Y. 449, 453, 117 N. E. 942. In the cases petitioner cites (Pet. 7-11), the information sought was held privileged because it related to the diagnosis and treatment of a patient's illness—not merely, as here, to the patient's name and address.

[3] See *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 378 (C. A. 2).

tient's illness, but only the names an nes and addresses of petitioner's patients in order to ler to interrogate them on matters pertaining to petition etitioner's income tax liability for the years under investi investigation. And as the Court further noted (R. 42-43), 42-43), the District Court carefully directed the hospital ospital to take all precautions necessary against disclosu isclosure of privileged information, and invited the par the parties to seek further instruction in this respect if ect if they so desired.

The propriety of this order is so cle so clear in either case that the question whether federal o deral or New York law applies is academic. What is ever is even clearer is that the ultimate issue of New York law ork law petitioner raises, adequately resolved by both co both courts below, presents no basis for certiorari.

CONCLUSION

For the reasons stated, the petition fc tition for a writ of certiorari should be denied.

Respectfully submitted,

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